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No. 91-1133

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEN LEIGH SILETS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, in this action under the Freedom of Information Act to compel disclosure of agency records, the district court abused its discretion by ruling on the validity of the agency's decision to withhold information from certain documents without inspecting the disputed documents *in camera*.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 945 F.2d 227. The orders of the district court dismissing the action (Pet. App. 17) and overruling petitioner's objections to the magistrate's recommended decision (Pet. App. 23) are unreported. The orders of the magistrate denying petitioner's Motion for Production of Documents and In Camera Review of Documents (Pet. App. 19-20) and petitioner's Motion for Affidavit (Pet. App. 21) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1991. The petition for a writ of certiorari was filed on January 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, petitioner asked the U.S. Department of Justice for records relating to the electronic surveillance of Jimmy Hoffa and his associates from 1962 through 1964. The Department complied with petitioner's request, but provided ten of the responsive documents in redacted form. The Department claimed that the redacted information was exempt from disclosure under FOIA, see 5 U.S.C. 552(b). In 1988, petitioner brought this action in the United States District Court for the Northern District of Illinois, seeking to compel disclosure of the withheld information pursuant to 5 U.S.C. 552(a)(4)(B). Pet. App. 1-2; Pet. 14.

In the ensuing litigation, petitioner filed a motion to require the government to submit the disputed documents in unredacted form for *in camera* inspection by the magistrate to whom the case had been referred. NR 26.[1] The government opposed that motion and submitted two "*Vaughn* index"[2] declarations that described the redacted information and explained why the information had been withheld.

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[1] "NR" refers to the docket entry number assigned by the district court.

[2] The term "*Vaughn* index" is derived from *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The index "usually consists of a detailed affidavit, the purpose of which is to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.'" *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn* v. *Rosen*, 484 F.2d at 826).

NR 32; Pet. App. 25-39. One declaration concerned the information that had been withheld by the Criminal Division of the Justice Department; it was prepared by L. Jeffrey Ross, an attorney in the Office of Enforcement Operations of the Criminal Division.[3] The other declaration concerned the information that had been withheld by the FBI; it was prepared by Special Agent Angus Llewellyn, who worked in the Freedom of Information-Privacy Acts Section of the Records Management Division at FBI Headquarters in Washington, D.C.

On September 6, 1989, the magistrate issued a recommended decision in favor of the government, finding that the Ross and Llewellyn declarations justified the government's redactions:

> [T]he information withheld from disclosure was (1) outside the scope of plaintiff's FOIA requests; (2) internal FBI informant symbol numbers and codes disclosure of which might otherwise prejudice FBI effectiveness in conducting investigations; (3) suspects in FBI criminal investigations disclosing the identity of which might subject such persons to unwarranted invasions of personal privacy and public opprobrium or criticism; (4) personal information such as name and address of persons whose identity was not requested by plaintiff; and (5) federal grand jury witness information disclosure of which is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure. These affidavits adequately describe the withheld documents, explain the justification for non-dis-

[3] Petitioner's Appendix does not include the redacted documents, which were exhibits to the Ross and Llewellyn declarations. We are lodging a copy of those documents with this response.

> closure, and demonstrate that the withheld information falls logically within all or at least one of the several exemptions asserted with respect to a particular document or item.

Pet. App. 19-20. In a separate order, petitioner's request for *in camera* inspection was denied. NR 35.

2. The district court overruled petitioner's objections to the magistrate's recommended decision, Pet. App. 23, and subsequently dismissed the action, *id.* at 24.

3. The Seventh Circuit, sitting *en banc* on its own motion, affirmed.[4] It held that the district court did not abuse its discretion by refusing to review the disputed documents *in camera*. The Seventh Circuit relied on its prior decision in *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 210 (1985), where it held that a district court may rely on government affidavits, without inspecting the disputed documents *in camera*, when the affidavits "(1) describe the withheld documents and the justifications for nondisclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith." Pet. App. 3 (quoting *Kimberlin*, 774 F.2d at 210, and *Stein* v. *Dep't of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981)).

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[4] Initially, a divided panel of the Seventh Circuit voted to reverse. The dissenting member of that panel contended, in a proposed dissenting opinion, that the proposed majority opinion conflicted with the Seventh Circuit's prior decision in *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204 (1985). The proposed panel opinion was circulated to all active members of the Seventh Circuit, which voted to consider the case *en banc*. Pet. App. 2 n.1.

The court determined that the Ross and Llewellyn declarations satisfied the *Kimberlin* criteria with respect to each of the three classes of information at issue.

The first class of withheld information "concern[ed] information withheld to protect third parties," Pet. App. 4; it consisted primarily of the names of individuals who had been wiretapped by the FBI or who were mentioned in FBI documents describing surveillance of Hoffa, *ibid.* The court held that this information, as described in the government's declarations, "logically f[e]ll[] within" FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which exempts from disclosure "records or information compiled for law enforcement purposes * * * to the extent that the production * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The second class of information consisted of "the identity of a witness before a grand jury and a discussion of that witness' testimony." Pet. App. 5. The government withheld that information under FOIA Exemption 3, which shields matters that are "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The court determined that the government's affidavits demonstrated that the second class of information fell "squarely within" FOIA Exemption 3, because its disclosure was prohibited under Rule 6(e) of the Federal Rules of Criminal Procedure. Pet. App. 5-6.[5]

Finally, the court held that the government's affidavits were sufficient to justify withholding the third class of information—"symbol numbers used inter-

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[5] The court of appeals held that Rule 6(e) is a "statute" for purposes of Exemption 3. Pet. App. 5 (citing *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 582 n.23 (D.C. Cir. 1987)).

nally by the FBI to identify confidential sources," Pet. App. 6—under both Exemption 2, which protects from disclosure matters "related solely to the internal personnel rules and practices of an agency" *ibid.* (quoting 5 U.S.C. 552(b)(2)), and Exemption 7(D), which shields law enforcement records or information the disclosure of which "could reasonably be expected to reveal 'the identity of a confidential source . . . which furnished information on a confidential basis,'" Pet. App. 6 (quoting 5 U.S.C. 552(b)(7)(D)). The court found that the FBI affidavit "adequately describe[d] how the disclosure of symbol numbers could lead to the revelation of the sources." Pet. App. 6.

Judge Cudahy (joined by Judge Cummings) dissented. The dissenters would have looked beyond the government's affidavits, and required *in camera* inspection in light of "widely held and enduring suspicions" about the government's conduct in pursuing Jimmy Hoffa. Pet. App. 10. The dissenters also believed that the events described in the documents were "so stale that possible risks to sources, informants and the like seem increasingly remote." *Ibid.*

DISCUSSION

The court of appeals correctly upheld the district court's refusal to inspect the disputed documents *in camera*. That holding fully accords with the discretion accorded to district courts in the text of FOIA and FOIA case law. By contrast, there is no support for petitioner's broad contention that *in camera* inspection is required "in cases where the documents have been found and where the privacy exemptions are involved." Pet. 21. Thus, further review ordinarily would not be warranted.

Nonetheless, we believe that further review of the Seventh Circuit's decision in this case is warranted if, as we have urged, this Court grants our petition for a writ of certiorari filed this day seeking review of the Ninth Circuit's decision in *Wiener* v. *Federal Bureau of Investigation*, 943 F.2d 972 (1991). The Seventh Circuit's decision here and the Ninth Circuit's decision in *Wiener* represent drastically different approaches to appellate review of the manner in which district courts conduct FOIA litigation. Because plenary review in *Wiener*, if granted, will be illuminated by further review in the present case, we do not oppose certiorari.[6]

1. FOIA states that the district courts "*may* examine the contents of [disputed] agency records in camera." 5 U.S.C. 552(a)(4)(B) (emphasis added). "The *in camera* review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).[7]

Consistent with the plain language of FOIA, the court of appeals properly reviewed the district court's refusal to conduct *in camera* review for an abuse of discretion. Pet. App. 2. Under that standard, the court of appeals upheld the district court's ruling, concluding that the government's affidavits " '(1) de-

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[6] We have provided counsel in this case with a copy of our petition in *Wiener*.

[7] In amending FOIA in 1974 to authorize *in camera* inspection, Congress rejected a proposal to require *in camera* inspection in every case. S. Rep. No. 854, 93d Cong., 2d Sess. 14 (1974).

scribe[d] the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate[d] that the information withheld [fell] logically within the claimed exemption[s], and (3) [we]re not controverted by either contrary evidence in the record or evidence of agency bad faith.' " *Id.* at 3 (quoting *Kimberlin*, 774 F.2d at 210).

Contrary to petitioner's contention (Pet. 20), the Seventh Circuit's approach does not conflict with case law concerning the circumstances under which the district court may rely on government affidavits in lieu of *in camera* inspection. On the contrary, substantially the same approach "[has] been widely adopted in other circuits." *Center for Auto Safety* v. *EPA*, 731 F.2d 16, 22 n.8 (D.C. Cir. 1984).[8]

Petitioner also errs in asserting (Pet. 18-19) that the district court abused its discretion. Petitioner contends that *in camera* review was required because of the age of the documents, the alleged possibility of government wrongdoing in connection with the surveillance of Hoffa, and the small number of documents involved. The age of the documents, however, was clearly indicated in the government's affidavits; thus, assuming *arguendo* that their age was relevant to assessing the government's exemption claims, *in*

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[8] See *Lam Lek Chong* v. *United States Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991); *Lewis* v. *Internal Revenue Serv.*, 823 F.2d 375, 378-380 (9th Cir. 1987); *Davis* v. *Central Intelligence Agency*, 711 F.2d 858, 860 (8th Cir. 1983), cert. denied, 465 U.S. 1035 (1984); *Doherty* v. *United States Dep't of Justice*, 775 F.2d 49, 51-53 (2d Cir. 1985); *Lame* v. *United States Dep't of Justice*, 654 F.2d 917, 921 (3d Cir. 1981); *Barney* v. *Internal Revenue Serv.*, 618 F.2d 1268, 1272 (8th Cir. 1980); see also *Vaughn* v. *United States*, 936 F.2d 862, 867 (6th Cir. 1991); *Raven* v. *Panama Canal Co.*, 583 F.2d 169, 171-172 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979).

camera review would not have aided the district court in making that assessment. Petitioner's unsupported allegation of government wrongdoing likewise did not justify *in camera* review. As the court of appeals recognized, a rule requiring *in camera* review based merely upon such allegations "would flood the district courts with needless work." Pet. App. 8. Finally, it is irrelevant that "portions of only ten documents" are at issue. See Pet. 19. As the [c]ourt of appeals correctly observed, "the [d]istrict court, not the [c]ourt of [a]ppeals, is in the best position to evaluate the work involved to determine whether *in camera* review will unreasonably drain the [c]ourt's resources." Pet. App. 7.

2. As we discussed above, the court of appeals applied a three-part test in upholding the district court's reliance on the FBI's *Vaughn* indices. Petitioner separately challenges the "bad faith" component of this inquiry (Pet. 21-25), contending that it conflicts with FOIA provisions that (i) place on an agency the burden of justifying its withholding of information and (ii) require the district court to make a *de novo* determination of whether the information was properly withheld.

Petitioner's challenge is misconceived. It ignores the first two parts of the court of appeals' inquiry. When the government has, by affidavit or declaration, provided a "reasonably specific" description of the documents and shown that they "logically" fall within a FOIA exemption, it has met its burden of proof under FOIA. It is fully consistent with FOIA to require the plaintiff at that point to come forward with evidence to rebut the government's showing. If the plaintiff does not produce such evidence, the district

court is entitled to rely on the government's affidavits to make a *de novo* determination.

At bottom, petitioner's criticism of the court of appeals' approach reflects the view that the government's declarations regarding disputed documents in a FOIA case cannot be trusted. This skepticism collides with the principle that government records and official conduct are "generally accord[ed] * * * a presumption of legitimacy." *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991). The court of appeals merely held that a district court does not abuse its discretion in foregoing *in camera* inspection when nothing in the record suggests irregularity. That holding is eminently correct.

3. For reasons discussed above, we believe that the Seventh Circuit's decision in this case would not, standing alone, warrant further review. But that decision does not stand alone. As we have indicated in our petition for certiorari filed today, the Seventh Circuit's decision here and the Ninth Circuit's decision in *Wiener* represent sharply contrasting approaches to the showing that the government must make in order to prevail in a FOIA case. The Seventh Circuit assessed the adequacy of the government's *Vaughn* indices by determining whether they were sufficient to enable the district court to make the *de novo* determination required under FOIA. The Ninth Circuit, on the other hand, has required the maximum level of detail possible in a *Vaughn* index, without regard to whether such detail is necessary for the district court to rule on the claimed exemptions.[9]

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[9] In *Wiener*, the Ninth Circuit reversed the district court's decision granting summary judgment in favor of the government, based on its determination that the FBI had failed in the *Vaughn* indices to "disclose all it could" about the dis-

This cacophony of voices in the circuits— especially in the highly litigious world of FOIA—should not be allowed to persist.

The Seventh Circuit's approach is the proper one. Most importantly, the Seventh Circuit's approach is faithful to FOIA's text. The Ninth Circuit's approach is not. I. addition, by allowing the district court broad discretion in determining how to develop an adequate factual basis, the Seventh Circuit achieved a " 'workable formula' that 'balances, and protects all interests,' " in accordance with congressional intent. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). The Ninth Circuit's approach, in contrast, frustrates Congress's purpose to provide for "the fullest *responsible* disclosure," (S. Rep. No. 813, at 3 (emphasis added)), because, in actual operation, it tends to result in the disclosure of exempt information. See *Wiener* Pet. 9, 17-18, 19-20.

We believe that plenary review in *Wiener*, if granted, will be enhanced if the Ninth Circuit's decision is reviewed in connection with the Seventh Circuit's decision in this case. The Seventh Circuit's decision not only reflects an approach similar to that employed in other circuits, see *Center for Auto Safety*, 731 F.2d at 22 n.8, but also involves a typical fact

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puted documents. *Wiener* Pet. App. 7a. In the Ninth Circuit's view, the "adversarial process is unnecessarily compromised" unless the government's *Vaughn* index discloses "as much information as possible" without revealing the information that is claimed to be exempt. *Ibid.* The Ninth Circuit further held that a district court cannot resort to *in camera* inspection until the government has submitted a *Vaughn* index that satisfies the maximum-detail standard. *Id.* at 7a-8a.

pattern.[10] Of particular relevance, the *Vaughn* indices submitted to the district court below describe the government's withholdings, and explain the justification for those withholdings, in a level of detail comparable to the level of detail used in many other FOIA cases, including *Wiener*.

CONCLUSION

The petition should be granted if the petition for a writ of certiorari in *Federal Bureau of Investigation* v. *Wiener* is granted, and the two cases should be consolidated. Otherwise, the petition should be denied.

Respectfully submitted.

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[10] The one feature that distinguishes this case from the great majority of other FOIA cases is its unusually small record, consisting of only ten documents in dispute, comprising some 20 pages.

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